No. 89-474

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, District Attorney of Dutchess County,
Petitioner,

against

THOMAS J. CORBIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petition for a Writ of Certiorari

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(3309)

Question Presented

Whether, within the constraints of the double jeopardy clause of the Fifth Amendment, a motorist who causes the death of another person as the result of an automobile collision can be subject to prosecution for homicide, notwithstanding the fact that at the scene of the collision, and prior to the other operator's death, respondent received uniform traffic tickets for Driving While Intoxicated and Failure to Keep to the Right and subsequently entered guilty pleas to those accusatory instruments and was sentenced.

Parties

In the New York State Court of Appeals and the Appellate Division, Second Judicial Department the parties were Thomas J. Corbin and Judith A. Hillery, as Judge of the County Court, Dutchess County and William V. Grady, as District Attorney of Dutchess County. Judith A. Hillery, Judge of the County Court, who was represented by the New York State Attorney General, elected not to appear in either proceeding. In the County Court of Dutchess County the only parties were the People of the State of New York, represented by William V. Grady, District Attorney of Dutchess County and Thomas J. Corbin.

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To: The Honorable Chief Justice and the Associate Justices of the Supreme Court:

The District Attorney of Dutchess County, on behalf of the People of the State of New York, petitions for a writ of certiorari to review the Order of the New York State Court of Appeals in this case.

Opinions Below

The opinion of the New York Court of Appeals is set forth at Appendix pages 1a through 16a *infra*, and is unreported. The Order of the Appellate Division, Second Judicial Department dismissing an application to prohibit prosecution is set forth at Appendix pages 1b through 2b *infra*, and is unreported. The opinion of the County Court Judge denying respondent's motion to dismiss the Indictment is set forth at Appendix pages 1c through 11c *infra*, and is unreported.

Jurisdiction

The Order of the New York Court of Appeals was entered on July 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Constitutional and Statutory Provisions Involved

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice placed in jeopardy of life or limb. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> . . . [N]or shall any state deprive any person of life, liberty or property, without due process of law. . . .

New York State Vehicle and Traffic Law Section 1800(d) provides:

> A conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or motor cycle.

New York State Vehicle and Traffic Law Section 1120(a) provides in pertinent part:

> Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway. . . .

New York State Vehicle and Traffic Law Section 1192 provides in pertinent part:

> 2. No person shall operate a motor vehicle while he has .10 of 1 percentum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.
>
> 3. No person shall operate a motor vehicle while he is in an intoxicated condition.

New York Penal Law Section 125.15 which defines Manslaughter in the Second Degree provides in pertinent part:

> A person is guilty of manslaughter in the second degree when:
>
> 1. He recklessly causes the death of another person. . . .

New York State Penal Law Section 125.12 which defines Vehicular Manslaughter in the Second Degree provides in pertinent part:

> A person is guilty of vehicular manslaughter in the second degree when he:
>
> (1) commits the crime of criminally negligent homicide as defined in section 125.10, and
>
> (2) causes the death of such other person by operation of a vehicle in violation of subdivision two, three or four of section eleven hundred ninety-two of the vehicle and traffic law.

New York State Penal Law Section 125.10 which defines Criminally Negligent Homicide provides in pertinent part:

> A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

New York State Penal Law Section 120.00 which defines Assault in the Third Degree provides in pertinent part:

> A person is guilty of assault in the third degree when:
>
> . . .
>
> 2. He recklessly causes physical injury to another person.

Statement of the Case

At approximately 6:35 p.m. on October 3, 1987, while respondent was operating a motor vehicle in a westbound lane on a state highway, he drove his vehicle into the eastbound lane of traffic and struck the rear view mirror of a vehicle. He then continued into the eastbound lane striking a second vehicle operated by Brenda Dirago and occupied by Daniel Dirago. At the time of the impact there was a moderate to heavy rainfall; the respondent was traveling at forty-five (45) miles per hour and respondent's vehicle was nine (9) feet into the eastbound lane and there was an overlap of approximately two (2) feet between the left front of the Dirago vehicle and the left front of respondent's vehicle. That evening the respondent was issued two uniform traffic tickets accusing him of Driving While Intoxicated (New York State Vehicle and Traffic Law Section 1192(3)) and Failure to Keep Right (New York State Vehicle and Traffic Law Section 1120(a)). After the respondent's arrest, an Assistant District Attorney was called to the scene by the police to prepare a search warrant for the seizure of a sample of respondent's blood, if necessary. No search warrant was prepared because shortly after his arrest the respondent consented to taking a blood test for the purposes of determining the level of alcohol in his

blood. The Assistant District Attorney then left the scene. Later that evening Mrs. Dirago died as a result of injuries sustained in the automobile collision.

The uniform traffic tickets issued on the night of October 3, 1987, were returnable in the local criminal court on October 29, 1987. However, that Court later advanced the return date to October 27, 1987. On October 27th the respondent and counsel appeared before the local criminal court and respondent entered pleas of guilty to the two offenses charged in the uniform tickets. At the time the Court accepted the pleas the Judge was not aware that the case involved an automobile accident or a death. Since no prosecutor was present at the time the guilty pleas were entered, and no prosecutor had been scheduled to appear that night, the Court adjourned the matter for sentencing until November 17, 1987. On November 17th, the respondent was sentenced to the usual sentence imposed on a first-time Driving While Intoxicated offender, *i.e.*, a Three Hundred Fifty Dollar ($350.00) fine, a conditional discharge to attend the New York State Vehicle and Traffic Law Article 21 School, the respondent's license was suspended and he was given a twenty (20) day conditional license. At the time of sentencing neither the Assistant District Attorney who was present in the courtroom nor the Court knew that the case involved a fatal automobile collision.

In the meantime, on October 30, 1987, the District Attorney had received the results of respondent's October 3rd blood test which indicated that respondent had a blood alcohol level of .19 percent.

In early January 1988 the District Attorney received the report of an accident reconstructionist, which had been commissioned in early October 1987. A Grand Jury was then impanelled and an Indictment dated January 19, 1988, was returned accusing respondent Corbin of one count of Manslaughter in the Second Degree (in violation of New York State Penal Law Section 125.15); two counts of Vehicular Manslaughter in the Second Degree (in violation of New York State Penal Law Section 125.12, Subdivisions 1 and 2); one count of Criminally Negligent Homicide (in violation of New York State Penal Law Section 125.10); one count of Assault in the Third Degree (in violation of New York State Penal Law Section 120.00, Subdivision 2); one count of Operating a Motor Vehicle While Under the Influence of Alcohol (in violation of New York State Vehicle and Traffic Law Section 1192, Subdivision 2) and one count of Operating a Motor Vehicle While Under the Influence of Alcohol (in violation of New York State Vehicle and Traffic Law Section 1192, Subdivision 3).

In the County Court the respondent sought dismissal of the Indictment in part on the ground that prosecution under the Indictment was barred by his prior pleas of guilty to Driving While Intoxicated and Failure to Keep Right. After a hearing, the County Court denied the motion.

The respondent then commenced a proceeding pursuant to New York State Civil Practice Law and Rules Article 78 in the nature on prohibition seeking to prevent the County Court and the District Attorney from proceeding with his prosecution on the ground that such prosecution was barred

by the double jeopardy provisions of the United States Constitution. The Appellate Division dismissed the proceeding. The respondent then appealed to the New York State Court of Appeals. That Court reversed the Order of the Appellate Division. The majority of the Judges concluded that the double jeopardy principles of the Federal Constitution precluded prosecution under this Indictment. Speaking for the two dissenting Judges, Chief Judge Wachtler stated:

> It devalues the double jeopardy clause of the Fifth Amendment of the Federal Constitution when a defendant, unquestionably intoxicated at the time his auto struck and killed a person, avoids a homicide prosecution by actively misleading a justice of the peace into believing that no accident occurred, and no one was killed.

(14a *infra.*)

Reasons for Granting the Writ

This case presents a substantial issue of the application of former jeopardy principles under the Fifth Amendment of the United States Constitution on which there is significant disparity among the federal and state courts. This Court has long recognized that:

> . . . Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *Accord, Illinois v. Vitale*, 447 U.S. 410, 416, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980); *Brown v. Ohio*, 432 U.S. 161, 166, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); *Iannelli v. United States*, 420 U.S. 770, 785 N.17, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975). Here, respondent appeared before a local criminal court judge and entered pleas of guilty to Driving While Intoxicated in violation of Section 1192, Subdivision 3 of the New York State Vehicle and Traffic Law, *i.e.*, "No person shall operate a motor vehicle while he is in an intoxicated condition." The second purported guilty plea was to Failing to Keep to the Right in violation of New York State Vehicle and Traffic Law Section 1120(a) which provides: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway. . . ." Under the *Blockburger* test, Manslaughter in the Second Degree, as charged in the first count of the Indictment is not the same offense. It involves recklessly causing a death. Clearly, the Driving While Intoxicated statute requires proof that the defendant was intoxicated; that is not a statutory element of the crime of Manslaughter in the Second Degree under New York law.

On the other hand, Manslaughter in the Second Degree requires proof of a death whereas Driving While Intoxicated and Failure to Keep Right do not. Therefore, under traditional double jeopardy analysis, the prosecution for Manslaughter should be permitted. Under the second count of the Indictment respondent was charged with Vehicular Manslaughter in the Second Degree; more specifically he was accused of violating New York Penal Law Section 125.12, Subdivisions 1 and 2 in that with criminal negligence he caused the death of Brenda Dirago by operating a motor vehicle on a public highway while he had more than .10 of 1 percentum by weight of alcohol in his blood. Since respondent's prosecution in the local criminal court involved Common Law Driving While Intoxicated rather than driving with more than .10 of 1 percentum by weight of alcohol in his blood, this count of Vehicular Manslaughter in the Second Degree contains an element which was not part of the statutory crime of Driving While Intoxicated or Failure to Keep Right which was contained in the original uniform traffic ticket. Under the fourth count of the Indictment respondent is accused of Criminally Negligent Homicide. That prosecution should also be permitted since Criminally Negligent Homicide under New York law is committed when with criminal negligence a person causes the death of another person. Acting with criminal negligence and causing the death of another person are not elements of New York Common Law Driving While Intoxicated or Failure to Keep Right. Finally, the fifth count of the Indictment accused respondent of Reckless Assault in the Third Degree involving injuries to Daniel Dirago. Prosecution under that count should be permitted since recklessly causing physical injury to a third person is not an element of Common Law Driving While Intoxicated or Failure to Keep Right. Therefore, under traditional double jeopardy principles, the prosecution should be permitted to proceed under the first, second, fourth and fifth counts of the Indictment.

The majority of the New York State Court of Appeals ruled that traditional double jeopardy principles under the *Blockburger* test are no longer controlling because in *Illinois v. Vitale, supra,* this Court modified the *Blockburger* test. Other courts have also found that *Vitale* modified *Blockburger. E.g., State v. Lonergan,* 16 *Conn. App.* 358, 548 A. 2d 718 (1988), appeal granted 210 Conn. 812, 556 A. 2d 611 (1989); *Ex Parte Peterson,* 738 S.W. 2d 688 (Tex. Cr. App. 1987); *State v. Dively,* 92 N.J. 573, 458 A. 2d 502 (1983). However, conflicting opinions are held by other courts which have found that *Vitale* does not modify *Blockburger. E.g., United States v. Brooklier,* 637 F. 2d 620, 623-24 (Ninth Circuit, 1980), *cert. denied,* 450 U.S. 980, 101 S. Ct. 1514, 64 L. Ed. 2d 815 (1981); *State v. Seats,* 131 Ariz. 89, 638 P. 2d 1335 (1981) (En Banc); *People v. Jackson,* 118 Ill. 2d 179, 514 N.E. 2d 983, 113 Ill. Dec. 71 (1987). Moreover, members of this Court have recognized that the dicta in *Vitale* has created ambiguities. *Thigpen v. Roberts,* 468 U.S. 27, 35-37 (104 S. Ct. 2916, 2921-22, 82 L. Ed. 2d 23, 32 (Rehnquist, J.), dissenting); *Illinois v. Zegart,* 452 U.S. 948, 101 S. Ct. 3094, 69 L. Ed. 2d 961 (Burger, C. J.), dissenting from denial of petition for writ of certiorari).

The issue presented in this case is simple, but in need of clarification by this Court in light of the conflicting interpretations given to this Court's *Vitale* opinion.

Moreover, as the dissenting Judges in the New York Court of Appeals recognized, a criminal defendant should not be permitted to avoid prosecution for a homicide by entering a guilty plea to Driving While Intoxicated and a traffic infraction. The petitioner submits that the majority of the Court of Appeals incorrectly applied this Court's *Vitale* ruling.

As evidenced by the conflicting rulings of federal and state courts applying *Vitale*, this is a recurring problem arising throughout the nation and the petitioner submits that this Court should grant certiorari, review the determination of the New York State Court of Appeals and determine in accordance with well established decisions of this Court that there was no violation of the Fifth Amendment double jeopardy provision in charging Thomas J. Corbin with Manslaughter, Vehicular Manslaughter, Criminally Negligent Homicide and Assault in the Third Degree under counts one, two, four and five of the Indictment.

CONCLUSION

For these reasons, the writ of certiorari should be issued to review the order and opinion of the New York State Court of Appeals.

Dated: September 8, 1989

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeals, State of New York.

COURT OF APPEALS,

STATE OF NEW YORK.

2 NO. 132

IN THE MATTER

of

THOMAS J. CORBIN,

Appellant,

v.

JUDITH A. HILLERY, as Judge of the County Court, Dutchess County, *et al.*,

Respondents.

Richard T. Farrell, Ilene J. Miller, Brooklyn, & William G. Crane, Poughkeepsie, for appellant.

William V. Grady, DA, Dutchess County (Bridget R. Steller of counsel) respondent *pro se.*

Robert Abrams, Attorney General (Andrea Green of counsel) for respondent Hillery.

TITONE, J.

At issue in this appeal is whether an individual who has previously pleaded guilty to the misdemeanor of driving while intoxicated (Vehicle & Traffic Law § 1192[3]), as well as to a related traffic infraction, may subsequently be prosecuted on homicide, assault and other charges arising out of the same incident when the prosecution concedes its intention to use the facts underlying the former conviction to establish essential elements of the latter crimes. The constitutional problem has arisen in this case, despite the broad protections afforded by New York's statutory double jeopardy provisions (CPL, art 40), because, in this instance, those provisions are superseded by Vehicle & Traffic Law § 1800(d), which purports to authorize a subsequent vehicular assault and homicide prosecution even though the defendant has previously been prosecuted for and convicted of traffic violations for the same acts. A subsidiary question exists as to whether petitioner is precluded from invoking his right to be free from successive prosecutions for the same conduct because he was guilty of procuring the prior conviction, without the prosecutor's knowledge, as a means of avoiding prosecution for the more serious crimes (*see*, CPL 40.30[2][b]). Concluding that both issues should be resolved in petitioner's favor, we now reverse the Appellate Division judgment to the contrary and hold that petitioner's request for an order prohibiting further prosecution should have been granted.

I. *Factual Background*

On October 3, 1987, petitioner's automobile allegedly crossed a double yellow line and struck two other vehicles. As a result, petitioner and the passenger of one of the other vehicles were seriously injured and another individual was killed. Tests performed after the accident revealed that petitioner had a .19% blood alcohol level.

On the night of the accident, while he was in the hospital being treated for his own injuries, petitioner was served with two uniform traffic tickets, returnable October 29, 1987, charging him, respectively, with operating a motor vehicle in an intoxicated condition (Vehicle & Traffic Law § 1192[3]) and driving on the wrong side of the road (*see* Vehicle & Traffic Law § 1120). The return date of these traffic tickets was subsequently changed, apparently without notice to the District Attorney, from the 29th to the 27th of October, a night on which the District Attorney's office did not "cover" the Town Justice Court. The assistant district attorney who had prepared the paperwork on the traffic offense prosecutions (A.D.A. Glick) was inexplicably unaware that the accident had resulted in a fatality and, consequently, his written submissions to the court, which included a cover letter, a CPL 710.30 notice and a "statement of readiness," did not alert the court to the seriousness of the incident.

Petitioner appeared with his attorney on the scheduled return date and entered a plea of guilty to the charges contained in both traffic tickets. Petitioner's attorney did not volunteer that the case involved a fatality and, in response to a question by the Town Justice, indicated that he had had contact with the District Attorney's office about the case.[1] Although counsel had apparently expressed a preference to have sentence imposed immediately, the court decided to postpone sentencing until November 17, 1987, because the file contained no sentencing recommendation from the prosecutor.

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[1]The relevant portion of the transcript of the proceedings reads as follows:

Judge: Have you contacted [the] ADA's office?

Atty: Yes. We have received papers. We have also discussed this matter with Mr. Corbin [petitioner].

In fact, counsel's only "contact" with the District Attorney's office was his receipt of A.D.A. Glick's CPL 710.30 notice and statement of readiness.

On the date set for sentencing, the People were represented by A.D.A. Sauter, who was unaware that there had been a fatality, was unable to locate the file and had not spoken to A.D.A. Glick about the case. Nevertheless, Sauter did not request an adjournment so that she could ascertain the facts necessary to make an informed sentencing recommendation.

Petitioner's attorney remained silent, although he was aware that petitioner's automobile had been impounded in connection with an investigation of the accident. Thus, once again, the court remained ignorant of the severity of petitioner's offense. Petitioner was ultimately sentenced on his guilty pleas to a fine, a six-month revocation of his driver's license and other, related sanctions.

During the pendency of the traffic offense prosecution, other staff members within the District Attorney's office had actively been investigating the possibility of pressing more serious charges against petitioner. A.D.A. Chase, who was aware that a person had been killed in the accident began as early as October 6, 1987 to gather evidence. Despite his active involvement in building a homicide case against Petitioner, however, Chase did not attempt to ascertain the date petitioner was scheduled to appear in Town Justice Court on the traffic tickets, nor did he inform either the Town Justice Court or the assistant district attorney covering that court about his pending investigation. It was not until November 19, 1987, two days after the fact, that Chase learned of petitioner's guilty plea and sentencing.

A Grand Jury presentment was finally made in early January, 1988. The delay was allegedly occasioned, at least in part, by difficulties that the A.D.A. Chase encountered in obtaining a report by an accident reconstructionist. On January 19, 1988, an indictment was issued charging petitioner with one count of reckless manslaughter (Penal Law

§ 125.15[1]), two counts of second-degree vehicular manslaughter (Penal Law § 125.12),[2] one count of criminally negligent homicide (Penal Law § 125.10), one count of third-degree reckless assault (Penal Law § 120.00[2]), and two counts of driving while intoxicated (Vehicle & Traffic Law § 1192[2], [3]).

Petitioner promptly moved to dismiss the indictment on double jeopardy grounds. The motion was denied, however, after a hearing in which the County court in which the action was being prosecuted found that petitioner had procured the traffic prosecution, "without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution" for the more serious homicide charges (*see*, CPL 40.30[2][b]). Petitioner then commenced the present article 78 proceeding for a writ of prohibition, asserting, once again, that double jeopardy principles barred the prosecution of the January, 1988 indictment. The Appellate Division dismissed the petition without opinion, and this appeal, taken as of right on constitutional grounds, ensued. We now reverse. Since the double jeopardy clause of the United States Constitution bars prosecution of the homicide and assault counts and both the double jeopardy clause and

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[2]Count two charged petitioner with negligently causing death while driving with a blood alcohol count of .10% in violation of Vehicle & Traffic Law § 1192(2). Count three charged him with negligently causing death while operating a motor vehicle in an intoxicated condition in violation of Vehicle and Traffic Law § 1192(3).

the provisions of article 40 of the Criminal Procedure Law bar prosecution of the remaining counts, petitioner's request for a writ of prohibition should have been granted.[3]

II. *CPL 40.30(2)(b)*

As a threshold matter, we address the application of CPL 40.30(2)(b), which was the basis of the County Court's refusal to dismiss the indictment.[4] That subdivision provides for an exception to the general statutory prohibition against successive prosecutions (*see*, CPL 40.20) in cases where the previous prosecution "was for a lesser offense than could have been charged under the facts of the case,

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[3]Of course, prohibition lies to restrain violations of both statutory and constitutional double jeopardy rights (*see, e.g., Matter of Plummer v. Rothwax*, 63 NY2d 243, 249 n4; *Matter of Wiley v. Altman*, 52 NY2d 410, 412 n2; *Hall v. Potoker*, 49 NY2d 501, 505 n1; *Matter of Abraham v. Justices of N.Y. Sup. Ct. of Bronx County*, 37 NY2d 560, 564). Further, an aggrieved defendant may seek immediate relief in the form of prohibition even where, as here, he has already made an unsuccessful motion to dismiss in the criminal court in which the challenged indictment is being prosecuted (*Matter of Wiley v. Altman, supra*, at 412-413 n2).

[4]We must take issue with the dissenter's suggestion that we have "imprudent[ly]" reviewed the facts despite a lack of power to do so (dissent, slip op, at 2). First, the "affirmed finding of fact" doctrine (*see*, Cohen & Karger, Powers of the New York Court of Appeals, § 111) has no application here, since the Appellate Division was the court of first instance in this prohibition proceeding. Second, there is no reason to assume that the Appellate Division did, in fact, review the "facts" that were before the County Court on petitioner's prior motion to dismiss the indictment, since the former court's dismissal of the proceeding without opinion could have been based instead upon its disposition of any number of threshold procedural questions (*see, Matter of Forte v. Supreme Ct.*, 48 NY2d 179, 184-185). Finally, even if the Appellate Division had reviewed the facts and even if it had made findings that were binding on this Court, we would still be obliged to examine the record to ensure that the findings are at least minimally supported by the evidence (*see*, Cohen & Karger, *supra*, § 116).

and the prosecution was procured by the defendants without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense." Although this provision has not previously been construed by our court, it is apparent that it was intended primarily to address situations in which the defendant or his attorney induces a local criminal court, before the District Attorney has entered the picture, to accept a guilty plea and enter a conviction for a relatively minor offense as a means of foreclosing the possibility of a prosecution for a more serious offense in superior court (Staff Comment to Proposed CPL 20.30[2][b], at 58, cited in 3 Zett, NY Crim Prac [1986 ed] § 22.5[2], at 22-26 & n15; *see, People v. DiShaw*, 54 AD2d 1122). Although not necessarily limited to such situations, the provision evidently was designed primarily to withhold statutory double jeopardy protection in those situations where the responsible prosecuting authority did not have the opportunity to be heard or to apprise the court of the aggravating facts before a conviction for a mere infraction or lesser misdemeanor was entered.

Thus, it is a principal requirement for the application of CPL 40.30(2)(b) that the prior prosecution have been procured "without the knowledge of the appropriate prosecutor" (*see, generally, People v. Daby*, 56 AD2d 875). In this case, that requirement is simply not satisfied. Although no representative of the Dutchess County District Attorney, the "appropriate prosecutor" (*see, id.*), was present on October 27, 1987, the date petitioner's guilty plea was accepted, the District Attorney's office had actively participated in the traffic infraction prosecution in the Town Justice Court by filing a CPL 710.30 notice and a statement of readiness. Moreover, the District Attorney's office was represented at the sentencing, the final step in what CPL 40.30(1)(a) defines as a "prior prosecution" for purposes of the statutory double jeopardy rules (*see, People v.*

Snyder, 99 AD2d 83, 85). Accordingly, while petitioner and his counsel may have been less than forthcoming in their dealings with the Town Justice Court at the time that petitioner's guilty plea was entered, it certainly cannot be said that the traffic infraction prosecution was conducted, or the conviction obtained, without the knowledge of the Dutchess County District Attorney's office.[5]

Further, whether or not petitioner's attorney deceived the Town Justice Court, as the dissenter contends, it cannot be said that the District Attorney's opportunity to oppose the lenient disposition was lost because of any misconduct by either petitioner or his attorney.[6] Rather, that opportunity was lost, and the Town Justice was left without a reason to

[5]The dissenter objects to our emphasis on the role assigned to the District Attorney under CPL 40.30(2)(b) (*see*, dissent, slip op, at 2), but offers no interpretation of his own for the statutory use of the phrase "without the knowledge of the appropriate prosecutor." Indeed, the dissenter's formulation of the statute's reach ("[p]rocurement means engineering your own prosecution and conviction on a lesser crime to avoid full punishment for criminal acts" [dissent, slip op, at 2]), as well as his analysis of petitioner's case, seems to ignore this aspect of the statute entirely. Significantly, the facts in this case do not even satisfy the dissenter's formulation of evasive engineering, since petitioner did not ask to be charged with the lesser traffic infractions, was not responsible for the change in appearance date which led to the District Attorney's absence at the plea allocution and, most certainly, did not "engineer" the Town Justice's ignorance of the facts surrounding his case. If anything, the latter circumstance was "engineered" by the District Attorney's office, which failed at every possible turn to bring the necessary facts to the Justice Court's attention.

[6]We note, however, that, contrary to the dissenter's contention, petitioner did not "actively [mislead] a justice of the peace into believing that no accident occurred, and no one was killed" (dissent, slip op, at 1). In fact, petitioner made no representations at all, "active" or otherwise, about the occurrence of an accident or the results of that accident. The sole discussion on the record that preceded the formal plea allocution on October 27, 1989 is reproduced in footnote 1 above

(Footnote continued on following page)

reconsider petitioner's previously entered guilty plea (*see, Matter of Lockett v. Juviler*, 65 NY2d 182, 186-187), because the prosecuting assistant district attorney's admitted lack of familiarity with the details of the case led her to remain silent at the sentencing. Thus, to apply CPL 40.30(2)(b) here would be to extend it well beyond the intended scope of its coverage. Accordingly, we decline to invoke the statute and thereby override petitioner's right to be free from successive prosecutions in these circumstances. That conclusion leads us directly to our consideration of the complex statutory and constitutional problems that this appeal presents.

(Footnote continued.)

(slip op, at 3). As is evident from the quoted colloquy, petitioner's attorney merely responded, in arguably truthful terms, to a simple question from the Town Justice as to whether counsel had had contact with the District Attorney. Further, the Town Justice's own hearing testimony negates any possibility that the attorney's conduct, whether misleading or not, was a causative factor in the lenient disposition petitioner received. The Justice testified that he asked his question specifically to elicit whether counsel "had some kind of letter or documentation from the District Attorney's office indicating their disposition as to sentencing," so that he "could accept the plea and sentence on that night." Having learned through counsel's response that no such documentation existed, the Justice postponed sentencing to give the District Attorney an opportunity to appear. Thus, whatever counsel intended by his terse response, it is apparent that the comment did not persuade the court to take action that was *favorable* to his client. Further, while counsel may have been less than forthcoming, both at the plea allocution and at the sentencing, and was unquestionably attempting to take advantage of the highly favorable tactical situation created by the prosecutor's omissions, we are reluctant to characterize his behavior as misconduct, much less to construe CPL 40.30(2)(b) in such a way as to encompass these circumstances (*see, People v. Snyder, supra; cf., People v. DiShaw*, 54 AD2d 1122, *supra*). While an attorney may certainly not, directly or indirectly, misrepresent the facts, a practitioner representing a client at a traffic violation prosecution should not be expected to *volunteer* information that is likely to be highly damaging to his client's position.

III. *Vehicle & Traffic Law § 1800(d)*

Analysis of the rules governing successive prosecutions in cases involving vehicular crimes must begin with Vehicle & Traffic Law § 1800(d), which provides that a conviction for a violation of any of the Vehicle & Traffic Law's prohibitions "shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle * * *." Because this is a specific statute obviously enacted for a special purpose, it must be deemed to take precedence over the more general rules for successive prosecutions that are contained in article 40 of the Criminal Procedure Law (*see, M/O Martinis v. Supreme Ct.*, 15 NY2d 240, 249 [plurality opinion per Dye, J.]; *see, also,* McKinney's Consol Laws, Book 1, Statutes, § 397). Thus, Vehicle & Traffic Law § 1800(d) supersedes CPL 40.20 and, to the extent that it does not conflict with constitutional double jeopardy principles, it permits successive prosecution for homicide and assault charges, notwithstanding a prior prosecution for traffic offenses arising out of the same incident (*see,* CPL 40.20[2]). Since petitioner was charged with homicide and assault crimes in the first five counts of the challenged indictment, Vehicle & Traffic Law § 1800(d) is directly implicated and we must therefore consider whether that statute may constitutionally be applied in these circumstances.

Our court has previously had occasion to consider the double jeopardy implications of section 1800(d) (*M/O Martinis v. Supreme Ct.* (*supra*). However, the split decision in that case did not definitively resolve the constitutional problem presented by that statute, particularly in light of the evolving nature of the federal constitutional double jeopardy rule. Accordingly, cases arising under that statute still possess a constitutional dimension, and it is to that dimension that we must now turn.

IV. *Federal Double Jeopardy Principles*

Our federal constitutional analysis must begin with *Blockburger v. United States* (284 US 299), in which the Supreme Court discussed what constitutes the "same offense" for purposes of the federal double jeopardy clause. Under the familiar *Blockburger* rule, if " 'each [penal] statute requires proof of an additional fact which the other does not,' " the offenses are not the same and successive prosecution is not forbidden (*Brown v. Ohio,* 342 US 161 quoting *Morey v. Commonwealth,* 108 Mass 433, 434). The *Blockburger* test "focuses on the proof necessary to prove the statutory elements of each offense rather than on the actual evidence to be presented at trial" (*Illinois v. Vitale,* 447 US 410, 416). In essence, to be the "same offense" within the meaning of the federal double jeopardy clause the crimes must have essentially the same statutory elements or one must be a lesser included offense of the other.

Accordingly, in *Illinois v. Vitale* (*supra*), the Supreme Court refused to prohibit a reckless manslaughter prosecution that arose out of a traffic incident although the defendant had already been charged with and had pleaded guilty to a traffic infraction ("failure to slow") arising out of the same incident. The *Vitale* Court stressed that reckless manslaughter did not, as a general rule, *require* proof of failure to slow and thus was not the "same offense" as failure to slow within the *Blockburger* analysis. However, the Court also went on to note, in pointed dictum that there would be a "substantial" double jeopardy problem if, on the trial of the manslaughter charge, the prosecution "relies on and proves a failure to slow * * * as the reckless act necessary to prove manslaughter" (447 US, at 421).

This dictum has direct application in this case. Although reckless manslaughter (Penal Law §125.15[1]) (count one), second-degree vehicular manslaughter (Penal Law §125.12) (counts two and three), criminally negligent

homicide (Penal Law §125.10) (count four) and third-degree reckless assault (Penal Law §120.00[2]) (count five) are clearly not the "same offenses" as the traffic offenses to which defendant previously pleaded guilty, *i.e.*, driving while intoxicated (Vehicle & Traffic Law §1192[3]) and failing to keep right (*id.*, §1120; *see, Illinois v. Vitale, supra; Blockburger v. United States, supra*), the prosecution here has affirmatively stated in its bill of particulars that it intends to use the acts underlying the latter offenses as the major part of its proof on the reckless and negligence elements of the former crimes. This statement of the prosecution's theory became a part of its pleadings and, until amended, was binding on the People (*see, People v. Shealy*, 51 NY2d 933; *People v. Barnes*, 50 NY2d 375, 379 n3; *see, also, People v. Grega*, 72 NY2d 489, 498). Thus, unlike in *Illinois v. Vitale* (*supra*), there is no need in this case to await the trial to ascertain whether the prosecution will rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges. The "substantial" double jeopardy problem identified in *Vitale* is apparent on the face of the People's pleadings.

Accordingly, prosecution of the homicide and assault counts in this indictment (counts one through five) is constitutionally prohibited, and Vehicle & Traffic Law §1800(d) cannot constitutionally be applied.[7]

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[7]Even without regard to the analysis in *Illinois v. Vitale* (*supra*), prosecution of the two second-degree vehicular manslaughter counts against petitioner (counts two and three) is prohibited because those crimes are the "same offenses" within the meaning of the traditional *Blockburger* test. Second-degree vehicular manslaughter is, in essence, the crime of criminally negligent homicide (*see*, Penal Law §125.10), with driving while intoxicated in violation of Vehicle & Traffic Law §1192(2) or (3) as an aggravating factor. Thus, driving while intoxicated in violation of Vehicle & Traffic Law §1192(3), the offense to which petitioner pleaded guilty, is unquestionably a lesser included offense of second-degree vehicular manslaughter, as that crime was

(Footnote continued on following page)

V. *Counts Six and Seven*

We consider the last two indictment counts separately because the analysis for these counts is different and, in fact, does not require resort to federal constitutional double jeopardy principles. Since neither count charges a homicide or an assault crime, Vehicle & Traffic Law §1800(d) is inapplicable by its terms and, thus, CPL 40.20, the general statutory double jeopardy provision, is controlling.

CPL 40.20(2) clearly prohibits prosecution of these counts, since they unquestionably arose out of the "same transaction" as the traffic offenses to which defendant previously pleaded guilty. Further, although not necessary to our holding, we note that these counts charge offenses which are indistinguishable from the misdemeanor to which petitioner previously pleaded guilty and, consequently, prosecution of these counts falls squarely within the constitutional double jeopardy prohibition. Accordingly, prosecution of these counts is now barred.

VI. *Conclusion*

Notwithstanding the language of Vehicle & Traffic Law §1800(d), the double jeopardy clause of the Fifth Amendment to the United States Constitution bars prosecution of the homicide and assault offenses charged in the indictment. The remainder of the indictment charges are barred

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(Footnote continued.)

charged in count three of the indictment, and accordingly, it is the "same offense" under *Blockburger*. Further, while count two of the indictment charged second-degree manslaughter while driving in violation of Vehicle & Traffic Law §1192(2), a linguistically different offense from the one to which petitioner pleaded, the proof necessary to establish the "driving while intoxicated" elements of each of these crimes is the same. Consequently, the crimes charged in count two should also be considered the "same offense" for purposes of *Blockburger*.

by our State's statutory rules governing successive prosecutions. Accordingly, the judgment of the Appellate Division dismissing the petition should be reversed, without costs, the petition granted and further prosecution prohibited.
M/O Corbin v. Hillery
Case No. 132

WACHTLER, Ch. J. (Dissenting):

It devalues the double jeopardy clause of the Fifth Amendment of the Federal Constitution when a defendant unquestionably intoxicated at the time his auto struck and killed a person, avoids a homicide prosecution by actively misleading a justice of the peace into believing that no accident occurred, and no one was killed. CPL §40.30(2)(b) prevents such fraudulent schemes to avoid criminal liability, by stating that a prosecution "procured by the defendant, without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense" cannot be invoked as a bar to the reprosecution under double jeopardy principles.

In the case now before us, petitioner, while intoxicated, drove his car across the center line, hitting another auto head on and killing a person. He then appeared in local court, and, with no District Attorney present, his attorney intentionally misled the court by stating that the District Attorney had been consulted on the case. Petitioner then pled guilty to a misdemeanor—driving while intoxicated—in order to prevent prosecution for homicide. Therefore this case falls squarely within CPL §40.30(2)(b) and the homicide prosecution should not be barred.

Indeed, two courts with power to review the facts—County Court and the Appellate Division—found that defendant's attorney intentionally misled the Justice of the Peace, and procured a minor conviction for his client, Corbin, so that criminal responsibility for causing a death could be avoided. This Court has no power in this case to

review the facts in this case. At this stage of appeal, it is imprudent and unwarranted for the majority to dispense with the factual assessments of those closest to the events, and on the dry record reach a different conclusion, all so that a constitutional question can be reached.

Moreover, lest there be any mistake, I note that the majority's test for "procurement," applied for the first time here, is woven from whole cloth tailored for the purpose of reaching the conclusion the majority desires. There is nothing in the case law, the statutory language, or the principles of double jeopardy from which a test focussing on the "opportunity to oppose the lenient disposition" by the District Attorney can be devised. Double jeopardy means being prosecuted by the State twice for the same conduct. Procurement means engineering your own prosecution and conviction on a lesser crime to avoid full punishment for criminal acts. In this case, using deception, petitioner prosecuted himself, toward the end of avoiding criminal liability for causing the death of another. This is procurement, as the lower courts found, and for that reason I respectfully dissent.

The lengthy footnote protestations of the majority do not, in the main, require comment. One does. I have not "distorted" the facts. The two lower courts found the facts as I have stated them in this opinion. These findings are supported by the record, as the majority opinion itself manifests (*see*, majority opinion at p 3). Of course, the majority is free to reject or ignore these findings, but it should not allege "distortion" when I have done no more than restate what was found by the lower courts, particularly when those findings are supported by the record.

Finally, it deserves comment that there appears to be a less onerous method of reaching the conclusion the majority desires, without declaring a statute unconstitutional. As the heading to VTL 1800 indicates, that section deals only with traffic infractions. If the majority feels it must reject

the determinations of the lower courts and find no procurement here, at least they should heed the admonition that statutes should be interpreted so as to be constitutional. When VTL 1800(d) is read as only applying to traffic infractions, petitioner's reprosecution is barred by CPL 40.20, and there is no need to employ what should be the court's last option of finding a statute unconstitutional.

* * *

Judgment reversed, without costs, petition granted and further prosecution prohibited. Opinion by Judge Titone in which Judges Kaye, Alexander and Hancock concur. Chief Judge Wachtler dissents and votes to affirm in an opinion in which Judge Bellacosa concurs, Judge Simons took no part. Decided July 13, 1989

APPENDIX B.

Order of Appellate Division, Second Department.

William C. Thompson, J.P.
Charles B. Lawrence
Isaac Rubin
Geraldine T. Eiber, JJ.

MOTION NOS. 7263-7264

IN THE MATTER

of

THOMAS J. CORBIN,

Petitioner,

v.

JUDITH A. HILLERY, as Judge of the County Court, Dutchess County, and WILLIAM V. GRADY, as District Attorney of Dutchess County,

Respondents.

Proceeding by petitioner pursuant to CPLR Article 78, (1) to stay and enjoin further prosecution of Dutchess County indictment No. 6/88, entitled *The People v. Thomas J. Corbin*, pending determination of this proceeding and (2) to prohibit any further prosecution arising out of an automobile accident on October 3, 1987, occurring on N.Y.

State Route 55, in the Town of LaGrange, Dutchess County, which was the subject of a prior prosecution, conviction and sentence within the meaning of Article 40 of the CPL.

Motion by petitioner to stay further prosecution of indictment No. 6/88 Dutchess County, pending determination of this petition.

Upon the papers filed in support of the petition and motion and the papers filed in opposition thereto, it is

ORDERED that the application is denied and the proceeding is dismissed, without costs, and it is further,

ORDERED that the motion is denied as academic and the temporary stay contained in the order to show cause dated August 31, 1988, vacated.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

October 26, 1988

APPENDIX C.

Opinion of County Court (8/18/88).

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF DUTCHESS.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

against

THOMAS J. CORBIN,

Defendant.

Ind. No. 6/88
Index No. 1988/377

By Indictment No. 6/88 dated January 19th, 1988, the Dutchess County Grand Jury has accused the above defendant of the following crimes: Manslaughter in the Second Degree, a Class C Felony, in violation of Section 125.15, Subdivision 1 of the Penal Law; Vehicular Manslaughter in the Second Degree, a Class D Felony, in violation of Section 125.12, Subdivisions 1 and 2 of the Penal Law (two counts); Criminally Negligent Homicide, a Class E Felony, in violation of Section 125.10 of the Penal Law; Assault in the Third Degree, a Class A Misdemeanor, in violation of Section 120.00, Subdivision 2 of the Penal Law; Operating a Motor Vehicle While Under the Influence

of Alcohol, a "Class A" Misdemeanor, in violation of Section 1192, Subdivision 2 of the Vehicle and Traffic Law; and Operating a Motor Vehicle While Under the Influence of Alcohol, a "Class A" Misdemeanor, in violation of Section 1192, Subdivision 3 of the Vehicle and Traffic Law of the State of New York.

Pursuant to an order of this Court dated June 27th, 1988, a hearing was held before this Court on August 12th and August 15th, 1988 to ascertain the facts surrounding defendant's plea and sentence in the Town of LaGrange Justice Court for common law Driving While Intoxicated and Failure to Keep to the Right. It is as a result of these convictions by guilty pleas on October 27th, 1987 and subsequent sentence on November 17th, 1987 that defendant has raised a bar to the instant Indictment on double jeopardy grounds.

Defendant was issued two uniform traffic tickets on October 3rd, 1987 for common law Driving While Intoxicated and Failure to Keep to the Right after two motor vehicle collisions on Route 55 in the Town of LaGrange, County of Dutchess and State of New York. At his arraignment in the Town of LaGrange Justice Court on October 27th, 1987, defendant pled guilty to both charges and was sentenced on November 17th, 1987 on the common law Driving While Intoxicated charge to a Three Hundred Fifty ($350.00) Dollar fine, a Ten ($10.00) Dollar surcharge, license revocation for six months and Article 21 driving school. Defendant, who was subsequently indicted on January 19th, 1988 by a Dutchess County Grand Jury for the crimes of Manslaughter in the Second Degree, Vehicular Manslaughter in the Second Degree (two counts), Criminally Negligent Homicide, Assault in the Third Degree, and operating a Motor Vehicle While Under the Influence of Alcohol (statutory and common law), contends that the Indictment is barred on double jeopardy grounds since it arises out of the same facts and circumstances for which the

two uniform traffic tickets were issued and to which he pled guilty and was sentenced by a local justice court judge.

This Court must determine whether defendant's prior convictions bar further prosecution for a greater offense arising out of the same alleged acts or whether prosecution is not barred since defendant's prior convictions were for lesser offenses than could have been charged on the same alleged facts because the prosecution was procured by the defendant without the knowledge of the appropriate prosecutor, for the purpose of avoiding the greater offense or alternatively, whether Section 1800, Subdivision d of the Vehicle and Traffic Law of the State of New York is dispositive of the Double Jeopardy issue.

The following witnesses testified for the People: Assistant District Attorneys Mark H. Glick, Frank M. Chase, and Heidi Sauter; Town of LaGrange Justice Edmund V. Caplicki, Jr., and Town of LaGrange Court Clerk Sandra Dillon. The defendant called the following witnesses: Assistant District Attorney Thomas J. Dolan, Mark Reisman, Esq., and William G. Crane, Esq., an associate and partner, respectively, of the law firm of Crane, Wolfson, Roberts & Greller, Esqs., which law firm represented the defendant in the local court and which law firm represents the defendant in this Court.

Findings of Fact.

The defendant was Indicted for Manslaughter in the Second Degree, Vehicular Manslaughter in the Second Degree, Criminally Negligent Homicide, Assault in the Third Degree, and operating a Motor Vehicle While Under the Influence of Alcohol (two counts), for an incident which occurred on October 3rd 1987 on Route 55 in the Town of LaGrange, County of Dutchess and State of New York, as a result of defendant allegedly operating his motor vehicle while being both statutorily intoxicated and while being

intoxicated and in an intoxicated manner and driving his motor vehicle into the opposite lane of traffic and colliding with another motor vehicle traveling in the opposite direction causing the death of one occupant and physical injury to another occupant of the other motor vehicle.

The defendant was issued a Uniform Traffic Ticket for Operating a Motor Vehicle While Under the Influence of Alcohol and a Uniform Traffic Ticket for Failure to Keep to the Right. Assistant District Attorney Thomas J. Dolan was present at the scene to assist the investigating law enforcement agency in obtaining a Court ordered blood sample in the event the defendant refused to consent to same. The defendant was transported to a local hospital where a blood sample was taken from him for the purpose of law enforcement officials ascertaining his blood alcohol content. Assistant District Attorney Mark H. Glick, the DWI prosecutor for the Town of LaGrange Justice Court, sent out a letter dated October 14th, 1987 (People's Exhibit #1 in Evidence) to the Town of LaGrange Justice Court and to the defendant enclosing the People's 710.30 notice and statement of readiness in the matter of People v. Thomas J. Corbin. Assistant District Attorney Glick was not aware that this motor vehicle accident resulted in a fatality when he transmitted these documents. Assistant District Attorney Frank M. Chase, who was in charge of the special DWI prosecutors, took charge of this case on October 6th, 1987 and was aware on that date that the motor vehicle accident had resulted in a fatality and as a result he began to gather evidence, impounded the vehicles for future inspection, had pictures taken, contacted the arresting agency so that blood samples taken would be preserved, directed that statements be taken by the arresting agency and contacted an accident reconstructionist to begin an investigation. Chase received the New York State certified lab report of defendant's blood alcohol content on October 30th, 1987. On November 12th, 1987, Chase transmitted a letter to William G. Crane Esq., whom he had learned on October 6th, 1987 from a

member of the investigating law enforcement agency represented the defendant, advising him that the vehicles involved in the motor vehicle collision on October 3rd, 1987 had been impounded and could be examined by his office and that said vehicles had been examined by representatives of the District Attorney's office in preparation for a potential Grand Jury presentation (People's Exhibit #4 in Evidence). The District Attorney's office's investigation had not been completed by November 12th, 1987 because it was not in receipt of the accident reconstructionist's report which report was necessary in order to make a determination as to culpability based on the report reviewing road conditions, weather conditions, speed of the vehicles, and condition of the vehicles on the night of the collision. On November 19th, 1987 Chase learned of defendant's pleas and sentences in the Town of LaGrange Justice Court. Prosecutor Chase never ascertained the return date of the summonses issued to defendant on the night of the motor vehicle collision, never advised the local justice court that the matter was under continuing investigation by his office, never advised the local Town Justice not to accept a plea on the two tickets and never advised the Assistant District Attorney who covered the local town justice court not to accept a plea on the two Uniform Traffic Tickets.

On October 27th, 1987, the defendant appeared with his attorney, Mark Reisman, Esq., who had met the defendant for the first time that evening and who had been instructed by the senior partner in his firm, William G. Crane, Esq., to plead defendant guilty to the two Uniform Traffic Tickets. No Assistant District Attorney was present that evening in the Town of LaGrange Justice Court because it was not a night that the District Attorney's Office was scheduled to be present in that Court. At no time did defendant or his attorney advise the Court that this incident involved an accident or a fatality either during the allocution, prior to the allocution or subsequent to the allocution. Town Justice

Caplicki asked Attorney Mark Reisman whether he had contacted the District Attorney's Office concerning this matter and Reisman replied that he had contact with the District Attorney's Office. Attorney Reisman's only contact at the time of plea with the District Attorney's Office was receiving the CPL 710.30 notice and the CPL 30.30 notice from his client. No member of the defendant's law firm had contacted the District Attorney's Office prior to the defendant entering his guilty plea to the two Uniform Traffic Tickets. Defendant pled guilty to both Uniform Traffic Tickets. Defense counsel then advised the Court that defendant requested to be sentenced that evening.

At the time of defendant's pleas, Town of LaGrange Justice Edmund V. Caplicki, Jr., was not aware that the incident which had occurred on October 3rd, 1987 involved an accident or a fatality, nor was the Town Court in possession of a CPL 30.30 notice. Since Judge Caplicki had not received a written sentencing recommendation from Assistant District Attorney Heidi Sauter, the Assistant District Attorney who covered his Town Court, he adjourned sentencing until November 17th, 1987. On November 17th, 1987, the night of defendant's sentencing, the defendant, Mark Reisman, Esq., William G. Crane, Esq., and Assistant District Attorney Heidi Sauter were present in court. Prior to the date of defendant's sentencing William G. Crane, Esq., had received a letter from the District Attorney's Office advising that the vehicles were impounded and examined in preparation for a potential Grand Jury presentation.

Assistant District Attorney Sauter had not been able to locate the District Attorney's Office file prior to her Court appearance and was unable to communicate with Assistant District Attorney Glick. Assistant District Attorney Sauter was not aware at the time of sentencing that this case involved a fatality which was under continuing investigation by the District Attorney's Office.

Although Assistant District Attorney Sauter was not familiar with the particulars of this case, she did not request an adjournment of sentencing so that she could make an intelligent informed recommendation with respect to sentencing. Defendant was sentenced on the Driving While Intoxicated charge to a Three Hundred Fifty ($350.00) Dollar fine, six months revocation of his driver's license, a Ten ($10.00) Dollar surcharge, twenty (20) days conditional license and Article 21 Driving School.

Defendant alleges that CPL Section 40.20, Subdivision 1, prohibits a person from being twice prosecuted for the same offense and that the exceptions under CPL Section 40.20, Subdivision 2, and under CPL Section 40.30 are not applicable in this case. The defendant further alleges that in order to prove the elements of the crimes of manslaughter as charged, the People must rely on the very acts for which the defendant has previously been convicted, namely, common law driving while intoxicated and failure to keep to the right.

The People contend that defendant's prior convictions in the Town of LaGrange Justice Court do not bar the instant prosecution under Section 1800(d) of the Vehicle and Traffic Law. Furthermore the People contend that this Indictment is an exception to defendant's double jeopardy claim because defendant's plea in Town Court was a nullity since it was procured without knowledge of the appropriate prosecutor to avoid prosecution for the greater offense CPL 40.30, Subdivision 2 (b).

The Court does not find a bar to the instant indictment on double jeopardy grounds. CPL 40.20 (subd. 1) provides that "a person may not be twice prosecuted for the same offense." However, CPL 40.30 (subd. 2 par. b) provides that "a person is not deemed to have been prosecuted for an offense, within the meaning of CPL Section 40.20, when . . . such prosecution was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant without the

knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense."

Based on the testimony and proof adduced at this hearing, the Court finds the credible evidence reveals that there was a misrepresentation by defense counsel to the Town Justice at the time the plea was entered. Defense counsel replied affirmatively to the presiding justice's inquiry prior to accepting the pleas as to whether the District Attorney's Office had been contacted regarding this matter. The Court finds that this response constituted a crucial and material misrepresentation of fact which was relied upon by the Court in believing that the District Attorney's Office had prior knowledge of defendant's intention to plead guilty and implicitly that the District Attorney's Office consented to the entry of the two guilty pleas.

Furthermore, the Court finds that the failure of defendant and/or his counsel to inform Judge Caplicki that there had been two automobile accidents, one of which involved a fatality, coupled with the defense counsel's request for immediate sentencing, in this Court's opinion, created a situation where the non-disclosure of those facts was prejudicial to the fair administration of justice. Additionally, the failure of defense counsel, upon the receipt of Assistant District Attorney Chase's letter dated November 12th, 1987, to either communicate with Assistant District Attorney Chase to clarify the status of the case or to inform the Town Court Judge of this correspondence constituted a material misrepresentation of fact which was relied on by Judge Caplicki and which was prejudicial to the administration of justice. Arguably, it was, and is, the responsibility of the District Attorney's Office to be familiar with the files in their office and this issue would have been avoided by the implementation of safeguards to prevent the occurrence of such a situation. The Court, however, finds that the failure of defense counsel, on October 27th, 1987 to inform the Court that these pleas arose out of an incident involving

a fatality and further that the failure of counsel to inform the Court on November 17th, 1987 of Assistant District Attorney Chase's written communication leads this Court to no other conclusion than that the proceedings involving the taking of the pleas and the subsequent sentencings were carried out in such a manner and under circumstances which make those procedures as a matter of law a nullity (see CPL Section 40.30, Subd. 2(b); *Santobello v. New York*, 404 US 257; *Lynch v. Overholser*, 369 US 705; *People v. Barkin*, 49 NY2d 901; *People v. Bartley*, 47 NY 965; see also, Bellacosa, "Practice Commentary" to CPL 40.30, McKinney's Consol. Laws of New York).

Additionally, the Court further finds that Vehicle and Traffic Law Section 1800, Subdivision d, provides "a conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or motorcycle."

The Court of Appeals in the *Matter of Martinis v. Supreme Court* (15 NY2d 240, 248), held "Quite obviously, its purpose and design were intended to remove the very possibility here contended for, that is, to prevent prosecution upon a charge arising under the Vehicle and Traffic Law as a misdemeanor, whatever the result, from becoming a bar to a prosecution for an 'assault' or for a 'homicide' defined in the Penal Law."

The Court of Appeals, continuing at page 250 (Martinis) further held:

> "It would be a travesty of justice to hold that the prior prosecution upon the minor traffic offense as a misdemeanor precludes the subsequent prosecution for homicide as a felony. Such offenses are not so identical as to satisfy the traditional concept of double jeopardy."

This Court finds that the Court of Appeals in *Matter of Martinis v. Supreme Court, supra* at page 248, ruled on the constitutionality of Vehicle and Traffic Law Section 1800, Subdivision d, and is dispositive of the Double Jeopardy issue in this case. The Court of Appeals held:

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact for which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other" (*Gavieres v. United States*, 220 US 338, 342).

For the foregoing reasons, the defendant's motion to dismiss the Indictment on double jeopardy grounds is denied.

As to defendant's motion for Inspection of the Grand Jury minutes and Dismissal of the Indictment on the grounds that such proceedings were defective as addressed in Section II of defendant's Omnibus Motion, the same is granted to the extent that the Court has reviewed such minutes for the purpose of determining defendant's motion to dismiss upon the ground that such inspection would show that the defendant did not act with requisite criminal culpability that the evidence was otherwise insufficient to establish the necessary prerequisites for a true bill, and that the evidence upon which the indictment was based was otherwise inadequate and improper. Such Grand Jury evidence has been viewed most favorably as to the People (*People v. Warner-Lambert Co.*, 51 NY2d 295, 299). Upon such a motion, the defendant has the burden of proof, and such motion may be granted only upon a clear showing of insufficiency (*People v. Howell*, 3 NY2d 672, 675).

Having examined the minutes of the testimony before the Grand Jury dated January 14th and January 19th, 1988, the

Court determines that the indictment is based upon evidence which is legally sufficient to establish that the defendant committed the offenses set forth therein and competent and admissible evidence before the Grand Jury provides reasonable cause to believe that the defendant committed those offenses (CPL 190.65; *People v. Mayo*, 36 NY2d 1002; *People v. Haney*, 30 NY2d 328).

The Court has also reviewed the instructions given by the District Attorney to the Grand Jury and the same satisfy the standards applicable to Grand Jury proceedings (*People v. Valles*, 62 NY2d 36; *People v. Calbud, Inc.*, 49 NY2d 389). Accordingly, the motion to dismiss the indictment is denied.

This shall constitute the decision and order of this Court.

So ordered.

Dated: August 18th, 1988
Poughkeepsie, New York

HON. JUDITH A. HILLERY
Dutchess County Court Judge

To:

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